Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *B. B. v Canada Employment Insurance Commission*, 2020 SST 553

Tribunal File Number: GE-19-4047

BETWEEN:

B. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: March 11, 2020

DATE OF DECISION: March 12, 2020

DECISION

[1] The appeal is dismissed with modifications. The Appellant is not considered unemployed as of May 30, 2019, because the weeks correspond to weeks of leave set out by the Appellant's employment contract. However, the disentitlement period should end on July 3, 2019—that is, after the 35 days of leave set out by the employer.

OVERVIEW

[2] The Appellant worked as a sailor on a schedule of 35 days of work followed by 35 days of leave. He applied for Employment Insurance benefits during his period of leave because he was not a permanent employee and did not have the assurance of returning to work at the end of his period of leave.

[3] The Commission considers the Appellant to be disentitled from Employment Insurance benefits as of June 3, 2019, because he has not shown that he was unemployed during the periods of leave set out in his employment since they are part of his work schedule.

ISSUE

[4] Is the Appellant considered unemployed during the periods of leave set out in his employment?

ANALYSIS

Issue: Is the Appellant considered unemployed during the periods of leave set out in his employment?

[5] Employment Insurance benefits are payable to an insured person who qualifies and makes an initial claim for benefits for each week of unemployment that falls in the benefit period.[1]

[6] A week of unemployment is a week in which a claimant does not work a full working week. Furthermore, a week during which a claimant's contract of service continues and in

[1] *Employment Insurance Act* (EI Act), s 9.

respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.[2]

[7] An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if (a) in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment and (b) the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.[3]

[8] More specifically, a full working week is the number of hours, days, or shifts normally worked in a calendar week by persons in the claimant's grade, class, or shift at the factory, workshop, or other premises at which the claimant is or was employed.[4]

[9] The Appellant argues that he does not have the same terms and conditions of employment as a permanent employee. As a result, there is no assurance of returning to work after each of his employment contracts. He said that the employer may send the vessel to another country and that, at this time, he would not be able to work there. So, at the end of each contract, he puts his name on a list and waits to be called for a contract. He confirmed that the employer gives him a period of leave with the same number of days as the period he worked. However, he can pick up a contract during that period of leave if he receives a contract offer. He reiterated the fact that he does not have the same terms and conditions of employment as a permanent employee and said that he does not receive any salary during his period of leave.

[10] The Tribunal notes that the Appellant confirmed that he did the route between Montréal and Québec City and that, when he applied for benefits, he worked 35 days followed by 35 days of leave. He indicated that, at the end of each contract, he is not certain that he will be called back but confirmed that he worked on the vessel for almost a year.

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[2] EI Act, ss 11(1) and 11(2).
[3] EI Act, s 11(4).
[4] *Employment Insurance Regulations*, s 31(1).

[11] The Commission, in turn, is of the view that this is not a disentitlement imposed because of an absence from Canada, but rather a disentitlement because the Claimant has not proven that he was unemployed. The fact that the Claimant is a temporary employee does not prevent the Claimant from having a clear agreement with the employer under the collective agreement regarding the work schedule. The Commission is of the view that it has been shown that the Claimant must work more days to get leave equivalent to the number of days worked; therefore, he is deemed to have worked a full working week both during the period of work and during the period of leave that is of equal duration.

[12] The Tribunal notes that the collective agreement [*sic*] that the [translation] "work is performed on an alternating basis of consecutive working days followed by an equivalent number of lay-days."[5]

[13] Furthermore, the employer confirmed that the Appellant had a work schedule of 35 days of work followed by 35 days of leave. The employer stated that the Appellant would work as a third sailor so long as the vessel is on the Québec City–Montréal route. He would have no more work when the vessel leaves for the United States (GD3-35).

[14] The Court has said that "[i]n order to make a determination under subsection 11(4) of the Act, there must be evidence to show that the claimant worked more than the usual number of hours that are normally worked in a week by persons employed in full time employment. This question is essentially one of fact and the Umpire should not intervene unless the Board made a reviewable error, namely that it 'based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.'"[6]

[15] The Tribunal is of the view that, despite the fact that his work schedule does not include more hours, the Appellant usually works more days or periods of work than people working full-time. The Appellant worked for 35 days without interruption before having an equivalent period of leave of 35 days.

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[5] Taken from article 22.01 of the Convention collective de travail entre X et le Syndicat international des marins canadiens [Collective labour agreement between X and Seafarers' International Union of Canada] (GD3-66).
[6] *Canada (Attorney General) v Merrigan*, 2004 FCA 253.

[16] Therefore, the Tribunal is of the view that the period of 35 days of leave following the 35 days worked corresponds to a full working week. As a result, the Appellant is considered to have worked a full working week during each week that falls wholly or partly in the period of leave.[7]

[17] Therefore, the Tribunal is satisfied that the Appellant is not considered unemployed as of May 30, 2019, because the weeks correspond to weeks of leave set out by the Appellant's employment contract. The weeks of leave set out in the employment contract are weeks considered to be working weeks.[8] Therefore, the Claimant is not entitled to Employment Insurance benefits as of May 30, 2019. However, the Tribunal is of the view that the disentitlement period should end on July 3, 2019—that is, after the 35 days of leave set out by the employer.

CONCLUSION

[18] The appeal is dismissed with modifications.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	March 11, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	B. B., Appellant

[7] EI Act, s 11(4).
[8] *Ibid*.